

STATE OF MICHIGAN
COURT OF APPEALS

MARIA RUIZ and JAMIE RUIZ,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
February 21, 2006

No. 253997
Wayne Circuit Court
LC No. 03-306185-NI

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

On December 2, 2002, plaintiff Maria Ruiz fell after she stepped out of the passenger side of a car on Junction Street in Detroit. Defendant claims that the trial court should have granted its motion for summary disposition because it is immune from suit and the highway exception to governmental immunity does not apply. As this Court explained in *Pierce v City of Lansing*, 265 Mich App 174, 176-177; 694 NW2d 65 (2005):

Governmental immunity is a question of law that is reviewed de novo. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). Also, a trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion for summary disposition under MCR 2.116(C)(7), all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *Id.* at 119. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law. *Id.* at 120-122.

The highway exception to governmental immunity, MCL 691.1402(1), provides that an individual may recover damages for injuries resulting from a government agency's failure to maintain the improved portion of a highway designed for vehicular travel. MCL 691.1401(e) defines a highway as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." The highway exception is narrowly construed. *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 60 NW2d 633 (2000).

Both parties agree that, if plaintiff's injury occurred on a berm, which is "a strip of land between a public road and a sidewalk," the highway exception would not apply and defendant would be immune from suit under MCL 691.1407(1). This Court squarely addressed this issue in *Stevenson v Detroit*, 264 Mich App 37, 43; 689 NW2d 239 (2004). In *Stevenson*, the plaintiff sustained an injury when his bicycle sank into a hole in a berm. *Id.* at 39. This Court ruled that, because the plain language of MCL 691.1401(e) does not include the word "berm" within the definition of highway, the berm was not part of the highway for purposes of the highway exception and the defendant was, therefore, immune from suit. *Id.*, citing *Weaver v Detroit*, 252 Mich App 239, 244-245; 651 NW2d 482 (2002).¹

The photographs and depositions in the record conclusively show that the disputed area was not a berm. Rather, the photographs show that plaintiff fell on a deteriorated portion of the roadway where cars regularly parked. A witness to the accident also testified that "there was no curb and no berm but rather the street went to the sidewalk." Detroit argues that its employees referred to the location as a "berm" in their testimony, as did plaintiffs' counsel. However, it is clear that, read in context, the word "berm" was used as a way to reference the area, i.e., a shared phrase to facilitate communication during the depositions. Further, regardless whether Detroit employees used the word "berm," their characterization is not dispositive, particularly in light of photographs that clearly show that plaintiff fell on the street. Accordingly, the trial court correctly denied defendant's motion for summary disposition.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad

¹ Plaintiff argues that this Court wrongly decided *Stevenson* and that the dissent's reasoning in *Stevenson* is more persuasive. However, pursuant to MCR 7.215(J)(1), we must follow the rule of law established by a prior published decision of this Court that has not been reversed or modified by the Supreme Court, or by a special panel of this Court. However, for the reasons set forth in this opinion, the trial court nonetheless correctly denied defendant's motions for summary disposition.